

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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KENNETH J. PHELAN,

Plaintiff,

-v-

9:11-CV-314  
(DNH/DRH)

QUINN, Correctional Officer, Great Meadow  
Correctional Facility; SWAN, Correctional  
Officer, Great Meadow Correctional Facility;  
McDONALD, Correctional Officer, Great  
Meadow Correctional Facility; WARRINGTON,  
Correctional Officer, Great Meadow  
Correctional Facility; WASHER, Sergeant,  
Great Meadow Correctional Facility; MINAL,<sup>1</sup>  
Psychologist, Great Meadow Correctional  
Facility; TORRES, Counselor, Great Meadow  
Correctional Facility; OWENS, Sergeant,  
Great Meadow Correctional Facility; GEBO,  
Correctional Officer, Great Meadow Correctional  
Facility; FULLER, Correctional Officer, Great  
Meadow Correctional Facility; KISER,  
Correctional Officer, Great Meadow Correctional  
Facility; and MURPHY, Correctional Officer, Great  
Meadow Correctional Facility,

Defendants.<sup>2</sup>

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APPEARANCES:

OF COUNSEL:

KENNETH J. PHELAN  
Plaintiff Pro Se  
09-A-1183  
Five Points Correctional Facility  
Caller Box 119  
Romulus, NY 14541

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<sup>1</sup> In Phelan's second amended complaint, "Minal" is spelled "Manell."

<sup>2</sup> By Decision and Order dated June 19, 2012, Phelan's claim against Nurse Ted was dismissed.

HON. ERIC T. SCHNEIDERMAN  
Attorney General for the State of  
New York  
Attorney for Defendants  
The Capitol  
Albany, NY 12224

ADRIENNE J. KERWIN, ESQ.  
Ass't Attorney General

DAVID N. HURD  
United States District Judge

**DECISION and ORDER**

Plaintiff brought this action pursuant to 42 U.S.C. § 1983. On September 20, 2012, the Honorable Christian F. Hummel, United States Magistrate Judge, advised, by Report-Recommendation, that defendants' motions to dismiss be denied as to the retaliation claims against defendants McDonald, Warrington, Swan, and Gebo, and granted as to the failure to protect claims against defendants Quinn, Manell, Torres, and Washer. Magistrate Judge Hummel also recommended that the surviving claims and defendants be consolidated into a final, third amended complaint, which should contain all relevant facts regarding these claims as alleged in Phelan's opposition papers to defendants' present motion and further, that upon the filing of the third amended complaint, the pleadings be returned to Magistrate Judge Hummel for further review to ensure compliance. Plaintiff timely filed objections to the Report-Recommendation.

Based upon a careful review of the entire file and the recommendations of the Magistrate Judge, the Report-Recommendation is accepted in whole. See 28 U.S.C. 636(b)(1).

Therefore it is

ORDERED that

1. Defendants' motion to dismiss is GRANTED in part and DENIED in part;

2. Plaintiff's failure to protect claims against defendants Quinn, Manell, Torres, and Washer are DISMISSED;

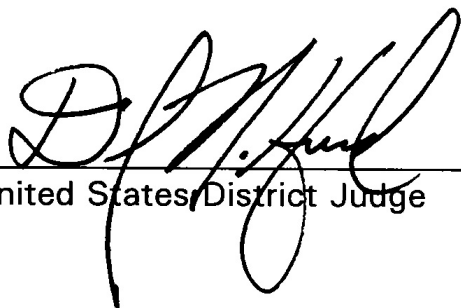
3. Plaintiff's retaliation claims against defendants McDonald, Warrington, Swan, and Gebo REMAIN;

4. The surviving claims and defendants be consolidated into a final, third amended complaint, which should contain all relevant facts regarding these claims as alleged in plaintiff's opposition papers to defendants' present motion; and

5. Upon the filing of the third amended complaint, the pleadings shall be returned to Magistrate Judge Hummel for further review to ensure compliance.

IT IS SO ORDERED.

Dated: October 23, 2012  
Utica, New York.

  
United States District Judge